STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 263671 Wayne Circuit Court
DENVER EDWIN LEE, Defendant-Appellant.	LC No. 04-010835-01

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.13, to 58 months to 15 years' imprisonment for the felon in possession conviction, and to two years' imprisonment for the felony-firearm conviction. We affirm.

I. FACTS

On October 12, 2004, at approximately 7:45 p.m., defendant approached Calvin Franklin, who was standing in front of his house, and asked "Can I buy some weed?" Franklin told defendant that he had the wrong house. While Franklin was talking to defendant, he noticed the butt of a gun sticking out of defendant's pocket. Franklin continued to ask defendant questions, and defendant stated, "Give me whatever you got," pulling out the gun. Franklin lunged for the gun, and wrestled with defendant. Franklin called to his family for help. Upon hearing his father's calls for help, Franklin's son, Calvin DeLoach, came outside. Franklin was then able to grab the gun, and defendant ran away. DeLoach jumped off the porch and chased after defendant, and Franklin followed after them with the gun in his hand.

Franklin and DeLoach chased defendant into a party store, where the storeowner called the police, and defendant was arrested. The police recovered the gun, along with defendant's shoes (one of which had been left on Franklin's porch and one on the curb). No fingerprints were found on either the weapon or the ammunition.

Defendant was originally tried by a jury on January 26, 2005, which resulted in an acquittal on the initial count of assault with intent to rob armed, MCL 750.89, and a hung jury on the remaining two counts—felon in possession of a firearm and felony-firearm. Following

defendant's initial trial, the issue of bond was addressed. After the trial court raised defendant's bond to a $50,000 cash bond, defense counsel objected. Following defense counsel's objection, the trial judge indicated that, having heard the testimony, he believed that defendant was guilty and that a $50,000 cash bond was necessary. At that time, defense counsel objected only on the bond issue.

Defendant then brought a motion to disqualify the trial judge on March 10, 2005, contending that he was personally biased or prejudiced against defendant because he "generally expressed disagreement with the jury's decision," and because he increased defendant's bond, which was "a clear indication of personal bias or prejudice against [defendant]." Defendant also contended that actual prejudice could be demonstrated where the judge expresses a preconceived notion of the defendant's guilt. The trial court denied defendant's motion for disqualification. Additionally, the trial court denied defendant's request to refer the matter to the chief judge.

Defendant was again tried by jury on May 24 and 25, 2005, and the jury found him guilty of felon in possession of a firearm and felony-firearm. Defendant now appeals.

II. DISQUALIFICATION OF JUDGE

Defendant argues that the trial court committed error, thereby denying him the right to a fair trial, when it denied his motion for disqualification. Defendant also contends that the trial court erred when it failed to refer the matter to the chief judge upon defense counsel's request. We disagree.

A. Standard of Review

To properly preserve a disqualification issue for appellate review, the defendant must follow the required procedures established under MCR 2.003. *People v Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988). According to MCR 2.003(C)(2), an affidavit "must" accompany a motion for disqualification. Here, defense counsel filed a written motion to disqualify the trial judge, but did not include an accompanying affidavit. Therefore, our review is for plain error affecting defendant's substantial rights because defendant failed to properly preserve this issue for appellate review. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Analysis

Defendant complains that the trial judge's comments during his bond hearing following the first trial demonstrate that the trial judge was personally biased or prejudiced against him. We disagree.

A party seeking disqualification of a judge based on bias or prejudice bears the burden of proof and must overcome the strong presumption of judicial impartiality. MCR 2.003(B); *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Absent proof of actual personal bias or prejudice, a judge will not normally be disqualified. *Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998). Generally, this requires the defendant to demonstrate that the bias is both personal and extrajudicial, or, in other words, "the challenged bias must have its origin in events or

sources of information gleaned outside the judicial proceeding." *Cain*, *supra* at 495-496. A judge's opinions that are formed on the basis of facts introduced or events that occur during the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or prejudice unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Cain*, *supra* at 496; *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Moreover, judicial disqualification based on due process is not easily met and, absent a showing of actual bias, is justified only where "'experience teaches that the probability of actual bias . . . is too high to be constitutionally tolerable.'" *Cain*, *supra* at 514, quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975).

Here, defendant was tried by a jury, and the judge therefore was not the trier of fact. In such a circumstance, "[t]he fact that the judge may believe the accused guilty of the crime charged is not sufficient to show prejudice." *Kolowich v Ferguson*, 264 Mich 668, 672; 250 NW 875 (1933). Furthermore, defendant's claim of bias or prejudice relates only to the trial judge's comments during the bond hearing, which was completely independent of the second jury trial. And while defendant also complains that the trial judge commented to the jury, "And you came back with a verdict that is really justified by the evidence. I don't think you could have reached any other verdict than that," these comments came after the jury rendered its verdict, so they are simply insufficient to demonstrate that defendant was prejudiced during the second trial. Therefore, we conclude that the motion for disqualification was properly denied.

With respect to defendant's claim that the trial court erred in failing to refer his motion for disqualification to the chief judge, we agree. However, the trial court's error is harmless. Although the "failure to refer [a] motion to disqualify to the chief judge on the request of a party is wrong and improper," *Gilbert v Daimler Chrysler Corp* (*On Reconsideration*), 469 Mich 889, 891; 670 NW2d 560 (2003) (citations omitted), the error is harmless where the motion for disqualification was properly denied. *People v Coones*, 216 Mich App 721, 727; 550 NW2d 600 (1996).

III. EFFECTIVENESS OF COUNSEL

Finally, defendant argues that his trial counsel was ineffective because she failed to secure a hearing before the chief judge following the trial court's denial of defendant's motion for disqualification. We disagree.

A. Standard of Review

Defendant failed to preserve this issue because he did not move for a new trial or evidentiary hearing below. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658; 620 NW2d 19 (2000). Review of unpreserved claims of ineffective assistance of counsel is limited to error apparent on the record. *Id*. at 659. "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Id*.

B. Analysis

Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below

an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). With respect to the prejudice prong of the test, a defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original). In addition, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Here, defendant merely claims that trial counsel's decision not to seek a hearing before the chief judge on the motion for disqualification was not a matter of trial strategy. But it is possible that trial counsel decided to proceed with the trial before the same trial judge based on the fact that the prior proceedings before the trial judge resulted in the acquittal of the most serious charge, assault with intent to rob while armed, and a hung jury on the remaining counts, after hearing the trial court's explanation of the comments made during the bond hearing. Without more, defendant has failed to overcome the strong presumption that counsel's action constituted sound trial strategy.

In addition, defendant has failed to demonstrate that a reasonable probability exists that the result of the proceedings would have been different. Here, there was substantial evidence to support defendant's convictions of possession of a firearm by a felon and felony-firearm. Calvin Franklin's version of the events demonstrated that defendant approached him with a gun in hand, which ensued in a struggle over the weapon. During the struggle, Franklin called for help from his family members, who responded and gave chase to defendant. Having chased defendant into a party store, Franklin and his family secured the weapon in the trunk of his car and turned it over to the police immediately. Franklin and his son, DeLoach were also able to provide a description of defendant to the police, indicating specifically that defendant was not wearing any shoes. In further corroboration of Franklin's testimony, the police later located defendant's shoes near the premises of Franklin's residence. Although defendant provided a different version of the events, the jury, as the finder of fact, was able to weigh the evidence and determine the witnesses' credibility. Based on this substantial evidence, defendant is unable to establish that the result of the proceedings would have been different. Accordingly, defendant's claim of ineffective assistance of counsel must fail.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette